



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professions of DOE, primarily Contracting Officers, and other officials of DOE that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures, if any, may only be made by DOE Contracting Officers.

Subject: Class Deviation Addressing Commercial Supplier Agreement Terms that Conflict with or are Incompatible with Federal Law

References:

Federal Acquisition Regulation (FAR) 1.404 Class deviations
FAR 12.301(f)
FAR 12.302(c)

When is this Acquisition Letter (AL) effective?

This AL is effective on the date issued.

When does this AL expire?

This AL remains in effect until superseded or canceled.

Who is the intended audience for this AL?

Contracting Officers within the Department of Energy (DOE) and the National Nuclear Security Administration (NNSA). Any reference in this guidance to DOE should be understood to include the NNSA, unless otherwise indicated.

Who are the points of contact?

For DOE questions, contact the Contract and Financial Assistance Policy Division at DOE_OAPMPolicy@hq.doe.gov.

For NNSA acquisition and financial assistance questions, contact at (505) 845-5639.

For additional information on Acquisition Letters and other issues, visit our website at <https://energy.gov/management/acquisition-letters>.

What is the purpose of this AL?

This AL notifies the DOE acquisition workforce of a class deviation to address common Commercial Supplier Agreement terms that conflict or are otherwise incompatible with Federal law. The AL also

transmits new DOE class deviations to FAR clauses 52.212-4 Contract Terms and Conditions – Commercial Products and Commercial Services and 52.232-39 Unenforceability of Unauthorized Obligations, and new DOE clause 952.232-70 Commercial Supplier Agreements – Unenforceable Clauses.

What types of contracts are affected by this AL?

This AL applies to all DOE contracting actions that require the issuance of a solicitation (e.g., Request for Quote (RFQ), Invitation for Bids (IFB), Request for Proposal (RFP)) where the resultant contract is for items containing a Commercial Supplier Agreement. Management & Operating contracts are not subject to this AL.

What is the background information?

Commercial Supplier Agreement terms (e.g., standard terms of sale or lease, Terms of Service (TOS), End User License Agreements (EULA), or other similar legal instruments or agreements) may be presented as part of a proposal or quotation response to a solicitation for a contract or order. These Commercial Supplier Agreement terms may include clauses that are acceptable to private parties but are improper or illegal for acceptance by the Federal Government. These commonly recurring, conflicting, or ambiguous clauses require DOE contracting activities to negotiate individual agreements to address the conflicts, often at significant cost to both the agency and contractor.

DOE has identified fifteen (15) common elements of Commercial Supplier Agreement terms that conflict or are incompatible with Federal law that must be resolved to align with Federal law or Government requirements in order for a valid contract to be formed. The DOE and NNSA Senior Procurement Executives have issued this class deviation to preemptively address those 15 common areas of conflict and ambiguity, thereby obtaining consistent contracting results while saving time and resources. For acquisitions governed by FAR Part 12, the DOE and NNSA Senior Procurement Executives have also issued a class waiver under the authority of FAR 12.301(f). In accordance with FAR 12.302(c), the class waiver permits contracting officers to utilize procedures that differ from customary commercial practices to address the 15 specified contract elements. The 15 areas are as follows.

1. Definition of contracting parties
2. Contract formation
3. Contractor indemnity (contractor assumes control of proceedings)
4. Automatic renewals of term-limited agreements
5. Future fees or penalties
6. Taxes
7. Payment terms or invoicing (late payment)
8. Automatic incorporation/deemed acceptance of third party terms
9. State/foreign law governed contracts
10. Equitable remedies, injunctions, binding arbitration
11. Unilateral termination of commercial supplier agreement by supplier
12. Unilateral modification of commercial supplier agreement by supplier
13. Assignment of commercial supplier agreement or Government contract by supplier
14. Confidentiality of commercial supplier agreement terms and conditions

15. Audits (automatic liability for payment)

Enacting this class deviation will protect DOE and its contractors by uniformly addressing common unacceptable terms, thereby reducing risk and administrative costs, and further streamlining the acquisition process.

This class deviation addresses the order of precedence and the 15 specific contract elements identified above. Contracting Officers are still encouraged to review and negotiate other terms not addressed in this deviation to remove or modify inconsistent terms and conditions and negotiate Federally-compatible supplemental agreements to ensure that the contracting activity's business needs are met.

What is the guidance/instructions contained in this AL?

A class deviation has been granted from FAR Parts 2 and 52.

A new definition for Commercial Supplier Agreement has been created at DEAR 902.101. Acquisition staff should familiarize themselves with the new definition found in the Attachment.

Contracting Officers are instructed to incorporate the clauses included in the Attachment into all new contract actions as follows:

1. Use DEAR 952.212-4 Contract Terms and Conditions – Commercial Products and Commercial Services (FAR DEVIATION) (JUN 2024) in lieu of FAR 52.212-4, when prescribed by FAR 12.301(b)(3), for the acquisition of commercial products and commercial services pursuant to FAR Part 12 and the contract includes items with Commercial Supplier Agreements.
2. Use DEAR 952.232-39 Unenforceability of Unauthorized Obligations (FAR DEVIATION) (JUN 2024) in lieu of FAR 52.232-39, when prescribed by FAR 32.706-3 and the contract includes items with Commercial Supplier Agreements.
3. Incorporate DEAR 952.232-70 Commercial Supplier Agreements – Unenforceable Clauses (JUN 2024) into all contracts when not using FAR Part 12 procedures and the contract includes items with Commercial Supplier Agreements.